

M52HNexO

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 NEXSTAR MEDIA INC.,

4 Plaintiff,

5 v.

21 Civ. 6860 (JGK)

6 COMCAST CABLE COMMUNICATIONS,  
7 LLC,

8 Defendant.

Telephone Conference

-----x

9 New York, N.Y.

10 May 2, 2022

11 11:05 a.m.

12 Before:

13 HON. JOHN G. KOELTL,

14 District Judge

15 APPEARANCES

16 COVINGTON & BURLING LLP (Los Angeles)

Attorneys for Plaintiff

17 BY: MITCHELL A. KAMIN

18 DAVIS POLK & WARDWELL

Attorneys for Defendant

19 BY: DANA MEREDITH SESHENS

M52HNexO

1 (The Court and all parties present remotely)

2 THE LAW CLERK: The case is Nexstar Media  
3 Inc. v. Comcast Cable Communications LLC, case  
4 No. 21 Civ. 6860.

5 THE COURT: All right. Who's on the line for the  
6 plaintiff?

7 MR. KAMIN: Good morning, your Honor. This is Mitch  
8 Kamin from Covington and Burling, for Nexstar Media.

9 THE COURT: And who's on the line for the defendant  
10 Comcast?

11 MS. SESHENS: Good morning, your Honor. This is Dana  
12 Seshens, Davis Polk & Wardwell LLP, for the defendant Comcast  
13 Cable Communications LLC.

14 THE COURT: All right. This is a motion to dismiss or  
15 stay by the defendant. I'm familiar with the papers.  
16 Perfectly prepared to listen to anything that the parties would  
17 like to tell me.

18 Ms. Seshens.

19 MS. SESHENS: Yes. Thank you, your Honor. May it  
20 please the Court, Dana Seshens, for the defendant, Comcast  
21 Cable Communications.

22 This case, in our view, your Honor, is exactly the  
23 type of case to which we think the primary jurisdiction  
24 doctrine should apply, and in fact, the case for application of  
25 that doctrine has only become stronger since briefing on

M52HNexO

1 Comcast's motion was complete.

2 As your Honor undoubtedly has seen in the record since  
3 the time that briefing was completed, the FCC has notified  
4 Comcast in writing that its petition, which was  
5 administratively converted to an informal complaint, is under  
6 review by the Media Bureau right now. Also since that time,  
7 another cable operator, Spectrum, owned by Charter has filed  
8 with the FCC a second informal complaint against Nexstar that  
9 is substantively identical to Comcast's complaint, raising  
10 similar issues based upon the same underlying conduct. And we  
11 would submit, your Honor, that the technical and policy issues  
12 presented in this case satisfy all of -- I'm sorry, your Honor.

13 THE COURT: Can I stop you just there.

14 MS. SESHENS: Of course.

15 THE COURT: The complaint by Comcast with the FCC is a  
16 violation of the ownership regulations, right?

17 MS. SESHENS: Among other things, but, yes, that is  
18 one of the contentions in the complaint.

19 THE COURT: But there's no allegation in the complaint  
20 of a violation of the negotiation regulations?

21 MS. SESHENS: That is correct, your Honor. There's no  
22 specific reference to the negotiation regulation. I think part  
23 and parcel of the allegations in the FCC complaint is that  
24 Nexstar's conduct has violated, at least in Comcast's view, any  
25 number of FCC rules and orders, the *Nexstar/Tribune* order being

M52HNexO

1 one that's identified, but the FCC would have the discretion to  
2 go beyond the rules that are identified.

3 But to directly answer your question, the specific  
4 negotiation rule or regulation is not identified in the Comcast  
5 FCC complaint.

6 THE COURT: So why should I wait for the FCC to decide  
7 the current complaint that doesn't directly raise the issue of  
8 a violation of the negotiation regulations? Doesn't the  
9 contract issue that's before me raise simply the question of  
10 whether the negotiation violates any FCC negotiation  
11 regulation?

12 MS. SESHENS: Well, respectfully, your Honor, I think  
13 the contract issue --

14 THE COURT: Hold on. Hold on one second.

15 MS. SESHENS: I'm sorry.

16 THE COURT: Please try to scrub "respectfully" from  
17 your vocabulary when you talk to me. I assume that unless  
18 lawyers give me reason to doubt it that what they say to me is  
19 respectfully and with all due respect. And oftentimes  
20 "respectfully" is simply an effort by lawyers to tell the Court  
21 that even though what may follow may otherwise be subject to  
22 contempt, don't take it that way, Judge, because I said "with  
23 all due respect."

24 MS. SESHENS: I appreciate that admonition, your  
25 Honor, and I'd like to think my next remarks would not be

M52HNexO

1 subject to contempt, but, rather, would reflect reasonable  
2 disagreement perhaps with the proposition that the Court has  
3 offered.

4 And what I would say, your Honor, is that the contract  
5 issue before the Court is actually broader than whether there  
6 is any violation of the negotiation rule as Nexstar has  
7 identified it, and the express language of the contract  
8 requires a determination of whether Nexstar has the right to  
9 negotiate retransmission consent for WPIX under the "FCC's  
10 rules." And the rules referenced are plural, and rules is  
11 defined in the contract broadly to include the rules and  
12 regulations and orders essentially of the FCC. So there is no  
13 limitation in the contract to a particular rule or regulation,  
14 and certainly none to the negotiation rule itself.

15 So from our perspective, your Honor, the reason to  
16 wait for the FCC is because the questions posed by Comcast in  
17 the FCC complaint are exactly the questions this Court will  
18 have to answer in determining whether Nexstar's conduct gives  
19 it the ability to negotiate retransmission consent for WPIX  
20 under the FCC rules as broadly defined.

21 THE COURT: Well, that's your interpretation of the  
22 contract. There's a specific provision in the contract which  
23 defines stations and provides an inclusion for new stations if  
24 Nexstar is not prohibited from negotiating for retransmission  
25 consent on behalf of such stations under FCC rules.

M52HNexO

1           Now, I don't decide anything, of course, until it's  
2   fully briefed, and the meaning of that contractual provision  
3   will plainly be the subject of dispute between the parties, but  
4   if that contract provision is eventually found to mean that --  
5   require a determination whether Nexstar is prohibited from  
6   negotiating for retransmission consent on behalf of such  
7   stations under FCC rules, one would wonder whether the correct  
8   interpretation of that contractual phrase is FCC negotiation  
9   rules as opposed to rules -- any FCC rules, and one would  
10   question whether the ownership rules would be a fair reading of  
11   that provision.

12           I understand the argument about the broad scope of FCC  
13   rules, but one would have to ask whether the ownership rules  
14   are, for example, a prohibition on negotiating for  
15   retransmission consent, if you follow what I'm asking.

16           MS. SESHENS: Yes, your Honor.

17           THE COURT: So that would come down to a question of  
18   contract interpretation rather than an ultimate question of the  
19   meaning of the ownership rules.

20           MS. SESHENS: I think, your Honor, two points in  
21   response. I think, as a matter of contract interpretation,  
22   FCC's rules is actually a defined term in the contract in  
23   Section 1. And the definition to which the parties agreed says  
24   that FCC's rules means the rules, regulation, and promulgated  
25   policies of the FCC. So that could mean any number of rules,

M52HNexO

1 regulations, and promulgated policies of the FCC. If the  
2 parties had intended to limit the ability to negotiate  
3 retransmission consent to the so-called negotiation rule, we  
4 would submit that the parties would have so agreed and/or would  
5 have defined FCC's rules in the plural differently.

6 I think, relatedly, your Honor, you will be asked, in  
7 deciding the interpretation of this provision, to conclude  
8 whether Nexstar has the ability to negotiation for this  
9 retransmission consent. We would submit that the sheer fact  
10 that the parties have differing views on which FCC rules are  
11 applicable here is an illustration of why this case is  
12 appropriate for a stay or dismissal without prejudice while the  
13 FCC considers that issue.

14 THE COURT: But the FCC is not considering that issue.  
15 The FCC is not considering the contractual interpretation.

16 MS. SESHENS: That is correct, your Honor. The  
17 question of the meaning of the retransmission consent agreement  
18 is not directly before the FCC, but what the FCC has been asked  
19 to weigh in on is whether Nexstar's conduct violates both the  
20 national ownership cap, runs contrary to the *Nexstar/Tribune*  
21 order, and otherwise undermines or undercuts the policies, the  
22 promulgated policies, of the FCC.

23 So the FCC complaint, therefore, asks the FCC to weigh  
24 in on that question in the first instance and then requests  
25 that the FCC fashion a remedy to address that conduct in the

M52HNexO

1 event it finds some form of a violation. And in that event the  
2 FCC, in the exercise of its discretion, which is virtually  
3 exclusive in this regard, could fashion a remedy that prohibits  
4 or restricts Nexstar's ability to negotiate retransmission  
5 consent. And that is expressly identified and set forth in the  
6 FCC complaint that is currently pending.

7 THE COURT: But that's highly speculative as to what  
8 the FCC would do. And the complaint in this action, and  
9 correct me if I'm wrong, seeks damages for breach of contract  
10 for fees that should have been paid and have not been paid. Is  
11 that fair?

12 MS. SESHENS: Yes, I think that's a fair assignment,  
13 your Honor.

14 THE COURT: So it would be highly speculative to say  
15 that in response to a complaint that doesn't specifically refer  
16 to the negotiation of retransmission fees for WPIX, the FCC  
17 would reach out to decide that question and, on top of that,  
18 would not decide the question on a going forward basis, but  
19 would say you're not entitled to all of these past fees. On a  
20 going forward basis, Nexstar argues there are lots of other  
21 remedies to an alleged violation of the ownership rules,  
22 including shedding stations in other markets.

23 Your turn.

24 MS. SESHENS: Yes, your Honor. That is Nexstar's  
25 argument. But I think, your Honor, from our perspective, the



M52HNexO

1 downside to deferral here or referral or staying the case is  
2 simply some delay without any prejudice to Nexstar. The case  
3 is about money damages, and the money will be available once  
4 the FCC resolves this issue, to the extent that is how the  
5 Court were to resolve the case. But on the flip side, if the  
6 Court were to proceed and make findings or determinations about  
7 the meaning of this contract provision and, for example, were  
8 to find that Nexstar has the authority to negotiate  
9 retransmission consent, but the FCC, in the exercise of its  
10 expertise and discretion, were to decide that Nexstar's conduct  
11 gave rise to the need for remedial action that would prohibit  
12 Nexstar from negotiating retransmission consent, then we have a  
13 real conflict between the FCC's rule and this Court's ruling,  
14 which could be avoided by simply staying this case or  
15 dismissing it without prejudice while the FCC proceeds.

16 We would again submit that Nexstar is not prejudiced  
17 by that, and it is free to return to this court or resume this  
18 case, and we would proceed accordingly once the FCC has made  
19 its determination.

20 THE COURT: Why does the FCC have expertise in  
21 determining the intent of the parties in entering into this  
22 particular provision of the retransmission agreement?

23 MS. SESHENS: So I don't think that's the expertise  
24 that the FCC brings to bear. And in fact, the interpretation  
25 of the contract provision is not, as we've noted, squarely

M52HNexO

1 before the FCC. That is obviously a question that the Court is  
2 well positioned to address. The FCC, however, does have the  
3 expertise and the almost unfettered discretion to decide issues  
4 around broadcast licensing. And the Nexstar conduct that is  
5 alleged in the FCC's petition directly bears on the propriety  
6 of the WPIX license and who is negotiating appropriately  
7 retransmission consent for that station. And that issue of who  
8 is properly -- or who is able to negotiate retransmission  
9 consent is squarely at play, both before the FCC and before the  
10 Court, based on the plain language of the agreement.

11 THE COURT: Anything else before I turn to Nexstar?

12 MS. SESHENS: I think -- your Honor, I think that  
13 covers the gist of what our position is, which I know your  
14 Honor is familiar with from the papers. I think, again, just  
15 to put a finer point on it, the nature of the parties'  
16 arguments here and the disputes that have arisen in this motion  
17 we really think highlight the reason why the primary  
18 jurisdiction doctrine should apply here. Given the nature of  
19 the retransmission consent and licensing issues that  
20 undoubtedly will come into play in this litigation, we think  
21 the doctrine applies and that the prudent course would be to  
22 stay or dismiss without prejudice this case while the FCC  
23 resolves the issues concerning Nexstar's conduct and any  
24 related remedies concerning the ability to negotiate  
25 retransmission consent.

M52HNexO

1 THE COURT: OK. Thank you.

2 Let me listen to Nexstar.

3 MR. KAMIN: Thank you, your Honor. It's Mitch Kamin  
4 from Covington & Burling, for Nexstar.

5 It's clear you've absorbed the authority and the  
6 arguments in our papers, so I won't belabor any of the points.  
7 I'll simply say that we, obviously, concur that this breach of  
8 contract issue is squarely before the Court but not before the  
9 FCC, and that any suggestion that issues germane to the breach  
10 of contract action would be resolved in the FCC proceeding are  
11 indeed highly speculative and depend on Comcast's argument that  
12 the FCC might take up the petition, it might find Nexstar  
13 violated the ownership cap, and it might impose a remedy that  
14 affects Nexstar's ability to negotiate for WPIX, and we  
15 disagree that any of that is likely to happen. And just as one  
16 example, the FCC has no obligation at all to act in response to  
17 this informal complaint that Comcast filed last July.

18 So unless your Honor has questions for me, I would  
19 submit on the papers.

20 THE COURT: The defendant says the FCC has agreed to  
21 take up the petition.

22 MR. KAMIN: I don't think there's any indication that  
23 the FCC has agreed to take up the petition, your Honor. The  
24 sequence is that the petition was filed last July seeking a  
25 declaratory judgment. If the FCC intended to commence

M52HNexO

1 proceedings on the declaratory judgment, it would open the  
2 public docket for public comment, and it has not done that.  
3 Instead, in response to a Comcast inquiry concerning whether  
4 the *ex parte* rules would apply to that proceeding in March last  
5 month, the FCC sent a letter to Comcast saying that it would  
6 consider its petition as an informal complaint.

7 "Informal complaint" is a very broad category. That  
8 includes everything from a consumer who's unhappy with  
9 programming on their local television station to an issue such  
10 as this. And there's no indication in the record that the FCC  
11 intends to act on that informal complaint, nor does it have an  
12 obligation to act on that informal complaint, your Honor.

13 THE COURT: OK. Thank you.

14 Anything else?

15 MR. KAMIN: Nothing from me, your Honor.

16 THE COURT: OK. I thank the parties. I appreciate  
17 the briefs. I appreciate the arguments. I'm prepared to  
18 decide.

19 The plaintiff, Nexstar Media Inc., brought this action  
20 against Comcast Cable Communications LLC for breach of  
21 contract. The claim arises out of Nexstar's allegations that  
22 Comcast did not pay Nexstar certain fees owed by Comcast to  
23 Nexstar under an agreement between the parties in connection  
24 with television station WPIX.

25 Shortly prior to Nexstar's initiating this lawsuit,

M52HNexO

1 Comcast had filed a petition with the Federal Communications  
2 Commission (FCC). The petition asks the FCC to find that  
3 Nexstar owned WPIX, in violation of certain FCC rules limiting  
4 ownership of commercial broadcast stations by a single entity,  
5 the ownership cap. Comcast now moves to stay or dismiss this  
6 action pending the resolution of the FCC petition on the  
7 grounds of the primary jurisdiction doctrine or pursuant to the  
8 Court's inherent authority to stay a case.

9 The following facts are taken from the complaint as  
10 well as other sources that the Court may consider on a motion  
11 to stay or dismiss on the grounds of the primary jurisdiction  
12 doctrine or pursuant to the Court's inherent authority. See  
13 *Canale v. Colgate-Palmolive Co.*, 258 F.Supp.3d 312, 324, note  
14 11 (S.D.N.Y. 2017). In particular, the Court takes judicial  
15 notice of the existence of Comcast's FCC petition and of the  
16 FCC's decision in *In re Application of Tribune Media Co.*,  
17 19-30, 2019 WL 4440126 (FCC Sept. 13, 2019); see  
18 *Miller v. DirecTV LLC*, No. 14 Civ. 7579, 2015 WL 12656912, at  
19 note 1 (C.D. Cal. Jan. 8, 2015); *Lyons v. Coxcom, Inc.*,  
20 718 F.Supp.2d 1232, 1237 (S.D. Cal. 2009), and of the  
21 information contained therein to the extent undisputed.

22 Comcast is a multichannel video programming  
23 distributor (MVPD). Nexstar is a television broadcast station  
24 group. Nexstar is party to a retransmission consent agreement  
25 with Comcast, the retransmission agreement.

M52HNexO

1 Pursuant to that agreement, Comcast is authorized, in  
2 exchange for a fee, to offer to Comcast clients Nexstar's  
3 programming. The retransmission agreement provides that  
4 certain stations not initially covered by the agreement may  
5 become covered by the agreement if Nexstar enters into a  
6 contract to provide certain services to the station and if  
7 Nexstar "is not prohibited from negotiating for retransmission  
8 consent on behalf of such stations under FCC rules." The same  
9 terms and conditions will apply to such additional stations as  
10 stations additionally covered by the agreement.

11 In 2019, Nexstar sought to acquire the broadcast  
12 stations of Tribune Media Company. Transfer of broadcast  
13 station licenses requires FCC approval. Because acquiring  
14 Tribune's stations would have caused Nexstar to exceed the  
15 ownership cap, in order to obtain FCC approval, Nexstar agreed  
16 to divest certain stations, including WPIX, to bring Nexstar  
17 below the ownership cap. Nexstar represented to the FCC that  
18 Nexstar would not be providing ongoing services under sharing  
19 agreements to WPIX. The FCC approved these transactions, and  
20 the sales were consummated.

21 Mission Broadcasting, Inc., later sought to acquire  
22 WPIX. In seeking approval for this transaction, Mission  
23 provided to the FCC a draft of an agreement into which Mission  
24 intended to enter with Nexstar regarding WPIX. The agreement  
25 would give Nexstar the right to program WPIX, to sell the

M52HNexO

1 station's advertising time, and to receive the station's  
2 revenues. The FCC approved Mission's purchase of WPIX. And in  
3 December 2020, Mission acquired WPIX, and Mission and Nexstar  
4 executed the agreement.

5 In July 2021, Comcast filed a petition with the FCC.  
6 The petition asked the FCC to find that Nexstar's relationship  
7 with WPIX constituted ownership for the purposes of the  
8 ownership cap, causing Nexstar to be in violation of the  
9 ownership cap. Two weeks later Nexstar initiated this action.

10 Nexstar contends that since December 2020, WPIX has  
11 been governed by the retransmission agreement, and that Comcast  
12 therefore owes licensing fees to Nexstar that it has not paid.  
13 The FCC has not yet rendered a decision on Comcast's petition  
14 that Nexstar's relationship with WPIX constituted ownership for  
15 purposes of the ownership cap.

16 This Court has jurisdiction pursuant to 28 U.S.C.  
17 Section 1332(a) because Nexstar is a Delaware corporation with  
18 its principal place of business in Texas. Comcast is an LLC  
19 whose only member is a Pennsylvania corporation with its  
20 principal place of business also in Pennsylvania. See  
21 *Bayerische Landesbank v. Aladdin Cap. Mgmt. LLC*, 692 F.3d 42,  
22 49 (2d Cir. 2012). The amount in controversy exceeds \$75,000.

23 Federal courts have a virtually unflagging obligation  
24 to exercise the jurisdiction given them. *Colorado River Water*  
25 *Conservation District v. United States*, 424 U.S. 800, 817

M52HNexO

1 (1976). One exception to that obligation, however, is the  
2 primary jurisdiction doctrine. *Tassy v. Brunswick Hospital*  
3 *Center, Inc.*, 296 F.3d 65, 68, note 2 (2d Cir. 2002). The  
4 doctrine allows a federal court to refer a matter extending  
5 beyond the conventional experience of judges or falling within  
6 the realm of administrative discretion to an administrative  
7 agency with more specialized experience, expertise, and  
8 insight. *National Communications Ass'n, Inc. v. American*  
9 *Telephone & Tel. Co.*, 46 F.3d 220, 222-23 (2d Cir. 1995). This  
10 narrow doctrine should not be applied where the issue at stake  
11 is legal in nature and lies within the traditional realm of  
12 judicial competence. *Goya Foods, Inc. v. Tropicana Products,*  
13 *Inc.*, 846 F.2d 848, 851 (2d Cir. 1988).

14 In determining whether to apply the doctrine, the  
15 threshold question is whether both the court and the agency  
16 have jurisdiction over the same issue. *Golden Hill Paugussett*  
17 *Tribe of Indian V. Weicker*, 39 F.3d 51, 59 (2d Cir. 1994). If  
18 this threshold is met, courts consider four factors: (1)  
19 whether the question at issue is within the conventional  
20 experience of judges or whether it involves technical or policy  
21 considerations within the agency's particular field of spirit  
22 advertise; (2) whether the question at issue is particularly  
23 within the agency's discretion; (3) whether there exists a  
24 substantial danger of inconsistent rulings; and (4) whether a  
25 prior application to the agency has been made. *Ellis v.*



M52HNexO

1     *Tribune Television Co.*, 443 F.3d 71, 82-83 (2d Cir. 2006).

2             Even if these factors counsel in favor of applying the  
3     primary jurisdiction doctrine, courts sometimes refuse to apply  
4     the doctrine where it would cause undue judicial delay,  
5     although the continuing validity of this practice has been  
6     called into question. *See Id.* at 90.

7             Nexstar's claim in this case is that Comcast breached  
8     the retransmission agreement by failing to pay fees to Nexstar  
9     for Comcast's retransmission of WPIX. Comcast's defense is  
10    that Nexstar is not entitled to any such fees because the  
11    language of the retransmission agreement does not create any  
12    obligations by Comcast with respect to television stations on  
13    whose behalf Nexstar is "prohibited from negotiating for  
14    retransmission consent on behalf of such station under FCC  
15    rules."

16            Comcast's FCC petition argues that Nexstar effectively  
17    "owns" WPIX under the FCC rules and that Nexstar there by  
18    violates the ownership cap. In the current motion, Comcast  
19    argues that if the FCC finds that Nexstar violates the  
20    ownership cap, Nexstar is "prohibited from negotiating for  
21    retransmission consent on behalf of" WPIX under the FCC rules  
22    within the meaning of the retransmission agreement. Thus,  
23    according to Comcast, Nexstar's claim hinges on the FCC's  
24    resolution of the question whether Nexstar "owns" WPIX and  
25    thereby violates the ownership cap.

M52HNexO

1           However, it does not follow from a finding that  
2           Nexstar violates the ownership cap, if any such finding is ever  
3           made, that Nexstar is thereby "prohibited from negotiating for  
4           retransmission consent on behalf of WPIX under FCC's rules."  
5           Comcast cites no case, statute, or regulation that so holds.  
6           Indeed, Comcast does not dispute that if Nexstar does, in fact,  
7           exceed the ownership cap, Nexstar could cure that violation by,  
8           for example, divesting stations other than WPIX within two  
9           years. See 47 CFR Section 73.3555(e)(3).

10           Nexstar has failed to show that if Nexstar violates  
11           the ownership cap, Nexstar is "prohibited from negotiating for  
12           retransmission consent on behalf of" WPIX under FCC's rules.  
13           Accordingly, the question whether Nexstar "owns" WPIX, in  
14           violation of the ownership cap, has no bearing on whether  
15           Comcast has violated the retransmission agreement in connection  
16           with WPIX, and the Court need not in this case make a finding  
17           as to whether Nexstar "owns" WPIX in violation of the ownership  
18           cap.

19           The primary jurisdiction doctrine should not be  
20           applied to this case. This is a straightforward contract case.  
21           The main issue, as explained by the parties, is whether Comcast  
22           violated its contract with Nexstar by failing to pay Nexstar  
23           for Nexstar's negotiations on behalf of WPIX. The answer to  
24           that question does not turn on the ownership rules, but rather  
25           the negotiations rules, which prohibit the coordination of

M52HNexO

1 negotiations between two stations if the stations exist in the  
2 same market unless such stations are under common control. See  
3 47 CFR 76.65(b)(1)(viii). While the FCC could make that  
4 determination, there is no showing that the application of that  
5 rule depends on agency discretion or expertise. The  
6 application of the relevant primary jurisdiction factors argue  
7 against dismissing or staying the case while the issue is  
8 presented, if ever, to the FCC.

9 As to the first and second factors, the issues in this  
10 case fall squarely within the Court's competence and do not  
11 implicate the FCC's discretion. The question whether Nexstar  
12 owns WPIX in violation of the ownership cap has no bearing on  
13 whether Nexstar is "prohibited from negotiate for the  
14 government retransmission consent on behalf of" WPIX under the  
15 FCC's rules. The issues highlighted by Comcast as areas  
16 particularly within the FCC's competence or discretion relate  
17 to the application of the FCC's rules governing ownership of  
18 commercial broadcast stations. Because those rules have no  
19 bearing on the contract dispute in this case, Comcast has  
20 identified no question presented in this case that implicates  
21 technical or policy considerations within the FCC's particular  
22 field of expertise, see *National Communications*, 46 F.3d at  
23 223, or the FCC's discretion, *Ellis*, 443 F.3d at 85-86. To the  
24 contrary, the issues actually presented in this case fall  
25 readily within the competence of this court. The case presents

M52HNexO

1 mainly standard contract issues. See *New York State Thruway*  
2 *Authority v. Level 3 Communications, LLC*, 734 F.Supp.2d 257,  
3 265 (N.D.N.Y. 2010). The only issues that go beyond standard  
4 contract issues are readily within this court's competence and  
5 implicate no FCC discretion.

6 While the breach of contract claim hinges in part on  
7 whether Nexstar is "prohibited from negotiation for  
8 retransmission consent on behalf of" WPIX under the FCC's  
9 rules, the only FCC rule identified by either party that  
10 pertains to whether Nexstar "may negotiation for retransmission  
11 consent on behalf of" WPIX is 47 CFR Section 76.65(b)(1)(viii).  
12 The only issue relevant to the contract dispute in this case  
13 that is presented by this rule is whether Nexstar owns a  
14 television broadcast station in the same local market as WPIX.  
15 That issue is a discrete factual issue that this court is  
16 readily capable of answering.

17 The issue, moreover, does not implicate the FCC's  
18 discretion given that the relevant rule is clear-cut and was  
19 required by Congress. See 47 U.S.C. Section 325(b)(3)(C)(iv)  
20 directing the FCC to implement regulations "prohibiting a  
21 television broadcast station from coordinating negotiations or  
22 negotiating on a joint basis with another television broadcast  
23 station in the same local market to grant retransmission  
24 consent under this section to" an MVPD. The first and second  
25 factors, therefore, weigh against abstention.

M52HNexO

1           Likewise, there is no danger of inconsistent  
2 adjudications. The issue currently before the FCC is whether  
3 Nexstar's relationship to WPIX constitutes ownership and  
4 therefore violates the ownership cap. This issue bears no  
5 relation to the contract dispute in this case, and the Court  
6 will therefore have no reason to resolve it. Accordingly,  
7 there is no risk of inconsistent rulings on this point, and the  
8 third factor therefore weighs against abstention.

9           The fourth factor, whether a prior application to the  
10 agency has been made, does not support primary jurisdiction in  
11 this case. Comcast has filed a petition with the FCC, but that  
12 petition does not implicate directly the negotiation rule, and  
13 that petition does not ask the FCC to answer the particular  
14 questions that will need to be resolved in this case.  
15 Therefore, the relevant factors weigh against application of  
16 the primary jurisdiction doctrine.

17           Considerations of judicial economy also weigh against  
18 application of the primary -- of the primary jurisdiction  
19 doctrine. Neither party contends that referral of this case to  
20 the FCC would result in a quicker resolution. The Court,  
21 therefore, will not dismiss or stay this case based on the  
22 primary jurisdiction doctrine.

23           Comcast asks the Court, in the alternative, to stay  
24 the case pending the resolution of Comcast's FCC petition  
25 pursuant to the Court's inherent authority. While the Court

M52HNexO

1 has the discretion to do so, a stay is an intrusion into the  
2 ordinary processes of administration and judicial review, *Gojo*  
3 *Industries, Inc. v. Innovative Biodefense, Inc.*, 407 F.Supp.3d  
4 356, 361 (S.D.N.Y. 2019). Accordingly, the party requesting a  
5 stay bears the burden of showing that the circumstances justify  
6 an excess of the Court's discretion. *Id.* at 362.

7 In considering whether to exercise this discretion,  
8 courts consider (1) the private interests of the nonmovant in  
9 proceeding expeditiously with the civil litigation as balanced  
10 against the prejudice to the nonmovant if delayed, (2) the  
11 private interests of and burden on the movant, (3) the  
12 interests of the courts, (4) the interests of persons not  
13 parties to the civil litigation, and (5) the public interest.  
14 In this case, Comcast has not made the requisite showing. For  
15 the reasons explained above, the outcome of the FCC proceeding  
16 will not affect the outcome of this case.

17 The second factor, the burden on Comcast caused by  
18 requiring it to continue litigating this proceeding is  
19 negligible because this contract dispute will have to be  
20 resolved, and it will not be resolved in the current FCC  
21 proceeding. By the same token, while Comcast argues that  
22 Comcast may need to implead or obtain discovery from Mission,  
23 because the current FCC proceeding will not resolve the issue  
24 in this case, staying the case would only delay the involvement  
25 of Mission.

M52HNexO

1           The fourth factor also does not weigh in favor of a  
2 stay. The first and third factors weigh against a stay because  
3 Nexstar has an interest in obtaining relief if it is entitled  
4 to relief, and the Court has an interest in advancing these  
5 proceedings. And Comcast fails to articulate any public  
6 interest that would be served by delaying these proceedings  
7 which seeks to resolve a private dispute between two  
8 sophisticated parties. Accordingly, the Court will not  
9 exercise its discretion to stay the case.

10           The Court has considered all of the arguments of the  
11 parties. To the extent not addressed above, the arguments are  
12 either moot or without merit for the forgoing reasons. The  
13 motion to dismiss or to stay this case is denied.

14           The clerk is directed to close docket Nos. 18 and 23.

15           So ordered.

16           OK. So now it's time for a scheduling order. I'm  
17 just looking over the docket sheet. Has there been an answer?

18           MS. SESHENS: Not yet, your Honor. This is Dana  
19 Seshens.

20           THE COURT: OK. So 14 days to answer or so?

21           MS. SESHENS: That would be fine, your Honor.

22           THE COURT: Why don't we say Comcast will answer by  
23 May 20. The parties should submit a Rule 26(f) report by  
24 June 3.

25           How long do the parties think for discovery in this

M52HNexO

1 case? I know you're going to have a --

2 MR. KAMIN: I apologize.

3 THE COURT: Thank you. No, no, it's OK. It's a  
4 difficulty of holding a conference by telephone. You're both  
5 very polite, and I appreciate it, and no one was trying to cut  
6 me off.

7 So any estimates with respect to time for discovery?  
8 I was going to say I appreciate that the answer to that  
9 question may turn on your conference under Rule 26, but go  
10 ahead.

11 MR. KAMIN: Thank you, your Honor. Mitch Kamin, for  
12 Nexstar.

13 I do think it will in part turn on the conference, but  
14 we believe an expedited discovery schedule makes sense given  
15 the narrow scope of the contract issue in this case and the  
16 limited amount of discovery that should be necessary here.

17 MS. SESHENS: Your Honor, this is Dana Seshens again.

18 I agree with Mr. Kamin that at least in part the  
19 duration will depend on the conference, and we're happy to  
20 confer about this as part of the Rule 26(f) process. But  
21 there, obviously, will be, from our perspective, very likely  
22 implications for Mission and additional potential claims here  
23 that are related. So that may complicate the schedule just a  
24 bit. And if Mr. Kamin has no objection, I think we can confer  
25 about the duration and come to a reasonable schedule, but happy



M52HNexO

1 to take guidance from the Court on that as we sit here now.

2 THE COURT: No, that's great. I mean, I encourage the  
3 parties to arrive at a reasonable schedule if, in fact, there  
4 is a third-party complaint against Mission. Is that what  
5 Comcast is contemplating?

6 MS. SESHENS: Yes, your Honor.

7 THE COURT: You don't have to commit yourself. Well,  
8 if that's true, I have to give time for Mission to respond to  
9 the third-party complaint, and Mission should be part of the  
10 Rule 26(f) conference. So if there is a third-party complaint  
11 against Mission, the parties should send me a letter and delay  
12 the transmission -- delay the filing of the 26(f) report for a  
13 short time to allow Mission to participate in the Rule 26  
14 conference and submit a joint 26(f) report.

15 How much time is necessary for discovery in this case?  
16 I wouldn't think that you'd need more than 90 days for  
17 discovery, but I'm certainly not on top of what the scope of  
18 the discovery would be in the case.

19 MS. SESHENS: Your Honor, one point I might add, just  
20 in the interest of transparency as we're talking about the  
21 potential landscape for this case, is there also could be a  
22 counterclaim against Nexstar to which it will have to answer  
23 or, if it so chooses, move. It would obviously be up to  
24 Nexstar to decide, but just as we think about the full range or  
25 full scope of what the case could look like, that is on the

M52HNexO

1 table as well. And so didn't want that to come as a surprise  
2 to your Honor if the schedule winds up needing to incorporate  
3 some time for that as well.

4 THE COURT: No, no, that's fine. Sure, no problem.

5 OK. Anything else that we could do today?

6 MR. KAMIN: Nothing further from the plaintiff, your  
7 Honor. Thank you.

8 MS. SESHENS: And nothing further from the defendant  
9 either. Thank you for your time, your Honor.

10 THE COURT: OK. Thank you all. Great. Bye now.

11 (Adjourned)